Supreme Court, U.S.
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No. 92-1960

In The

Supreme Court of the United States

October Term, 1993

DONALD G. RESHA, JR. and STATE OF FLORIDA,

Petitioners,

vs.

KATIE D. TUCKER,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF IN OPPOSITION

BRIAN S. DUFFY
McCONNAUGHHAY, ROLAND, MAIDA, CHERR & McCRANIE, P.A.
Florida Bar No. 180007
101 North Monroe Street
P.O. Drawer 229
Tallahassee, FL 32302-0229
(904) 222-8121
Facsimile (904) 222-4359

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The Proceedings Below

At the trial court petitioner Resha sought the court *and* investigative agency files pertaining to respondent Tucker. Resha[1] claimed that he needed the court and agency documents as evidence in his pending civil action against Tucker. A78-79. The decision of the First District Court of Appeal assailed here found that "Resha failed to demonstrate . . . the unavailability or lack of other means of obtaining the information sought." A5.

The trial judge in the civil action had earlier expressly permitted the inquiry sought by Resha: "The discovery inquiries made by the Plaintiff [Resha] concerning the entry of her [Tucker's] plea did not violate the spirit or the letter of Section 943.08." A87.

Resha purported to have a need for the criminal *court* file of Tucker so as to be equipped to impeach Tucker in the civil case with her *nolo contendere* plea. The trial court recognized that the *nolo* plea would not be admissible in the civil case, and denied access on that basis.[2] A111. Resha's attorney agreed. A113.

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[1] Mr. Resha did not personally attend the hearing. No evidence in any form was submitted at the hearing. The trial court heard and read only arguments of counsel.

[2] Fla. Stat. §90.410.

REASONS FOR DENYING THE WRIT

I. The Florida Court Decided The Federal Questions Correctly.

There is no qualified right of public access to judicial or executive agency records of completed criminal prosecutions which do not result in a conviction.

Resha wanted the file of the investigative agency, the Florida Department of Law Enforcement, for use as evidence in his civil action against Tucker. The First Amendment is not implicated in the denial of access to those records. *El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488, 494-95 (1st Cir. 1992).

Resha relies upon cases holding that the First Amendment is implicated when courts bar access to court proceedings that had traditionally been open to the public. Resha makes no effort to establish that documents pertaining to concluded criminal court proceedings or executive agency investigations have traditionally remained open to public scrutiny. Rather, Resha confesses that "Congress and 45 State Legislatures have enacted statutes similar to Florida's, with similar objectives in mind." Petition, page 12.[3] The Florida sealing statute is nearly twenty years old.[4] Pertinent case law is older. In *United States v. Kelly,* 55 F. 2d 67, 70 (2d Cir. 1932), the court stated that "[i]t should be added that all United States attorneys and marshals . . . are required to destroy or to surrender to the defendant all such records after

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[3] *See,* footnote 32, *Times* Petition.

[4] Fla. Stat. §901.33 (1975).

acquittal or when the prisoner is finally discharged without conviction."[5] The tradition is to protect the accused after the proceedings are concluded without a conviction.

In re Washington Post Co., 807 F. 2d 383 (4th Cir. 1986), is but one of several cases standing for the proposition that the press has a First Amendment right of access to witness criminal proceedings absent a compelling interest justifying closure. Despite Resha's argument that "[t]he Florida Court of Appeal's decision approving this sealing clearly conflicts with *In re Washington Post*",[6] there is no contention that Tucker's plea and sentencing hearing was closed. Moreover, the Florida statute itself implicitly recognizes the State Legislature's compelling interest in protecting the liberty interests (privacy, reputation, obtaining employment) of former criminal defendants.

II. The Florida Decision Does Not Directly Conflict With A Decision of the United States First Circuit Court of Appeals Invalidating A Massachusetts Statute.

The Florida decision does not conflict with *Globe Newspaper Co. v. Pokaski*, 868 F. 2d 497 (1st Cir. 1989). Unlike the challenged statute in *Pokaski*, the Florida statute provides for a judicial determination, and does not reduce the sealing procedure to a mandatory ministerial

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[5] *See.* also, *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906).

[6] Petition, page 18.

exercise. A102, 107.[7] Unlike the challenged statute in *Pokaski*, the Florida statute only allows a former criminal defendant to enjoy the benefits of sealing on one occasion. A101. Unlike the challenged statute in *Pokaski*, the Florida statute is not automatic; thus in Florida there is an opportunity for interested persons monitoring the criminal litigation (including Petitioner State of Florida, a party to every criminal case) to oppose the sealing motion.[8] A103, 107.

Pokaski found that a less restrictive means of promoting the Commonwealth's objectives would be to simply allow "defendants to move for the permanent sealing of their records at the conclusion of trials and the probable cause hearings, just as defendants are allowed to move for the closure of proceedings." *Pokaski*, 868, F. 2d at 507. This is precisely the procedure ordained by the Florida Legislature and the Florida Supreme Court. A101-108.

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[7] To the extent that the Massachusetts statute was not mandatory, *Pokaski* required only that the trial court make "specific, on the record findings that sealing was necessary to effectuate a compelling governmental interest." *Pokaski*, 968 F. 2d at 511. The Florida statute itself evidences the compelling governmental interest, should such be necessary.

[8] Although none of the lawyers in the civil litigation between Resha and Tucker monitored the criminal case after sentencing, Resha never proved that public notice was not afforded. *State ex rel. Tallahassee Democrat v. Cooksey*, 371 So. 2d 207 (Fla. 1st DCA 1979) (establishing public notice requirements for closure of pending criminal proceedings).

III. The Florida Court Has Not Decided An Important Question of Federal Law Which Should Be Decided By This Court.

The questions presented here are not sufficiently important to warrant review in light of the State's amendment of the statute. Resha stated in his brief before the Florida Supreme Court that: "The latest version of Florida's sealing law, §943.059, Fla. Stat. (1992 Supp.), specifically excludes criminal records of official misconduct from eligibility for sealing, even if adjudication is withheld." Petitioner's Initial Brief, page 25. In other words, sealing of files relating to the type of criminal charges lodged against Tucker is no longer permitted.

Resha argues that "this Court should take this opportunity to decide that the protection of the First Amendment extends to court records" and asserts that "[t]here is no reasoned distinction between the values underlying access to on-going proceedings and those proceedings which have concluded, especially in the criminal context." Petition, pages 23, 24. This Court may one day be presented with the question of whether the First Amendment requires access to court and executive agency records of pending criminal cases. Resha's petition is a quantum leap beyond that question, asking whether access to court and executive agency documents is mandated by the First Amendment when the proceedings have been fully open to press and public scrutiny, the former defendant was not adjudicated guilty, and the

litigation is ended. The issue is not ripe.

Respectfully submitted,

BRIAN S. DUFFY
McCONNAUGHHAY, ROLAND, MAIDA,
CHERR, & McCRANIE, P.A.
Florida Bar Number: 180007
Post Office Drawer 229
Tallahassee, Florida 32302
(904) 222-8121
Facsimile (904) 222-4359

Counsel for Respondent

APPENDIX

IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO: 90-674

STATE OF FLORIDA, :
vs. :
KATIE TUCKER, :
Defendant. :

PROCEEDING: Motion To Vacate Order Sealing Records

DATE: January 27, 1992

JUDGE: HONORABLE N. SANDERS SAULS
Circuit Judge

LOCATION: Leon County Courthouse
Tallahassee, Florida 32301

REPORTED BY: JUDY W. HUSSEY, C.S.R.
Official Court Reporter
Leon County Courthouse
Tallahassee, Florida 32301
(904) 487-3062

APPEARANCES:

For the State of Florida:

NEILL WADE, Esquire
Assistant State Attorney
Leon County Courthouse
Tallahassee, Florida 32301

For the Defendant/Katie Tucker:

JAMES P. JUDKINS, Esquire
1102 N. Gadsden Street
Tallahassee, Florida 32301

BRIAN S. DUFFY, Esquire
Monroe-Park Tower, Suite 950
101 North Monroe Street
Tallahassee, Florida 32302

For Mr. Resha:

RICHARD E. JOHNSON, Esquire
324 West College Avenue
Tallahassee, Florida 32301

WILLIAM FRIEDLANDER, Esquire

* * *

[p. 31] MR. DUFFY: It's at FDLE.

THE COURT: That Mr. Johnson and Mr. Friedlander they have elluded [sic] to that they need, which they contemplated, is right there. Now the only thing that could be left that you say there is a problem with this is that I notice you argue in your briefs something about whether or not we could have any impeachment.

MR. JOHNSON: Yes, sir.

THE COURT: And I ain't never heard of something like that if you've got a withhold, a no contest and a withhold and it goes in.

MR. JOHNSON: Well, Your Honor, you heard of it in the two cases I cited where they said that you could do that.

THE COURT: Sir?

MR. JOHNSON: I cited two cases in the memorandum –

THE COURT: Yeah, I didn't agree with those.

[p. 32] MR. JOHNSON: I can appreciate that you don't agree with them, Your Honor. Mr. Ehrhardt is skeptical of them as well, but they are the law in behalf of Florida and it hasn't been settled here and I would like to let Judge Davey decide that in the civil case what evidence he's going to let in. And if you preclude him from doing that by leaving that file here, then we end up with the same thing where we've got two judges working at cross purposes again.

THE COURT: Well you're going to have to have two working along to begin with because he's over there running the civil track and I'm over here. So to clarify it, so I don't – so there's not any misunderstanding, I would like for ya'll to try to sit down and work all this out.

But, you know, from what I've heard and from what I've seen and from what my understanding of the law is, you can't use what has happened here as a method of using impeachment based on prior convictions. So I am not going to unseal this. But I will modify my order to permit you – however, it can be devised – access to all that other.

And that would also have to be, even to that extent, it's going to be loaded up with injunctions and specifically and it needs to go directly to – who is [p. 33] your client? How many clients have you got? See, I want to know about that.

MR. FRIEDLANDER: Resha and two corporations.

THE COURT: And I want them specifically enjoined under this order, maybe they have to be in here to hear it or however I need to get it set up to do it so they know specifically if they take any of this information that maybe you've had to discuss with them or whatever or they try and go and, in effect, use if for some purpose to just spite, you know, as far as this particular defendant wherever she is or whatever she's doing and whatever capacity something to attempt to hurt whatever her status is now, then by me opening this, I don't want that to happen and I would want them under pain of contempt if they did.

* * *

[p. 43] THE COURT: It's kind of simple I think, Mr. Friedlander. You just want everything that there is in the investigative file, right?

MR. FRIEDLANDER: Everything at the D.O.R. and everything at the FDLE, tangible and documentary. If a memorandum was written by Katie Tucker that was back dated by eighteen months and typed by her on a typewriter which states, "I didn't tell you to do the things that you've been doing," and which was obviously created to save her job with the Cabinet, and it's a piece of paper it looks like this, you come to this quantity, that's the same kind of evidence that they would have have used to prosecute her and put her in jail. Well now she has been –

THE COURT: She might have been saying that did not occur and the State might have been proving whatever it is you're trying to prove. What is your theory of – never mind. I don't want your theory of your cause of action in your civil suit. But go ahead.

MR. FRIEDLANDER: I just want to make it clear that I don't believe the fact that that piece of paper might have been used in the criminal prosecution justifies keeping it out of the civil trial simply because she has [p. 44] pled nolo and gotten a withhold. I think it's only the fact that she pled nolo and got the withhold that doesn't go into the civil jury. None of the facts or circumstances around it. We could still prove the cover up. We can't prove she was prosecuted for the cover up and that there was a withhold. Is that what you're saying? Because if that's what you're saying, I understand it.

THE COURT: Yeah. I don't see any real problem.

MR. FRIEDLANDER: He doesn't agree at all. He thinks that he should have the right to put in the fact that she was prosecuted and the result of the prosecution.

THE COURT: Oh, I know that.

MR. FRIEDLANDER: And you've ruled –

THE COURT: I'm respectfully disagreeing with him on that one. He will take me down the hill there if he wants to on that. But no, I don't think, from what I've looked at, what you've got here, that's not something that can been used for impeachment purposes. And what you need to do is concentrate on what you're looking for as

your proof on the underlying facts and not for any impeachment purposes.

* * *